

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3
4 Arthur Daniel Mayo,
5 Petitioner
6 v.
7 Jo Gentry, et. al,
8 Respondents

2:16-cv-0599-JAD-GWF

Order Denying Motion to Stay
[ECF No. 30]

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10 In this habeas corpus action, Nevada prisoner Arthur Daniel Mayo challenges his 2014
11 state-court conviction for possession of a stolen vehicle.¹ The Court ruled on respondents'
12 motion to dismiss on November 21, 2016, found one of Mayo's claims—his Supplemental
13 Ground 1—unexhausted in state court, and gave Mayo an opportunity to make an election on
14 how to proceed.² Mayo responded with a motion for stay (ECF No. 30), requesting that this case
15 be stayed while he exhausts Supplemental Ground 1 in state court.³ On April 18, 2017, I ordered
16 supplemental briefing (ECF No. 33) on the question of the possible anticipatory procedural
17 default of Supplemental Ground 1 in state court.⁴

18 In Supplemental Ground 1, Mayo claims that he was denied his federal constitutional
19 right to effective assistance of counsel because his counsel misadvised him with respect to a plea
20 agreement, leading him to enter a plea agreement that he otherwise would not have entered. *See*
21 Memorandum (ECF No. 13) at 2–3. It is this claim that Mayo wishes to present in state court
22 before proceeding with this case.

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¹ ECF No. 6.

25 ² *See* Order entered November 21, 2016 (ECF No. 29).

26 ³ Respondents filed an opposition to that motion on February 2, 2017 (ECF No. 31). Mayo
27 replied on February 21, 2017 (ECF No. 32).

28 ⁴ On May 15, 2017, respondents filed a supplement to their opposition to Mayo's motion for stay
(ECF No. 34). On June 12, 2017, Mayo filed a supplemental reply (ECF No. 35).

1 But Mayo's Supplemental Ground 1 is now procedurally barred in state court. *See* NRS
2 34.726(1) (statute of limitations); NRS 34.810 (successive petitions). Mayo asserts only one
3 viable argument that there is cause for his failure to raise that claim previously in state court: that
4 he did not have counsel in his first state habeas action. *See Martinez v. Ryan*, 566 U.S. 1, 17
5 (2012) (lack of counsel in initial-review collateral proceeding in state court may function as
6 cause to overcome procedural default in federal court). While lack of counsel in Mayo's state
7 habeas action may function as cause to overcome the procedural default in this federal habeas
8 action, *see Martinez*, 566 U.S. at 17, the same is not true in Nevada state courts: they have not
9 recognized this basis as cause for a procedural default in non-capital cases in state court. *See*
10 *Brown v. McDaniel*, 331 P.3d 867, 875 (Nev. 2014) (declining to adopt *Martinez* rule as a matter
11 of state law). Because Mayo's Supplemental Ground 1 is procedurally barred in state court, and
12 he does not assert any viable argument that he can overcome that procedural bar, a stay of this
13 action to allow Mayo to return to state court to exhaust that claim would be futile. For this
14 reason, I deny Mayo's motion for stay.

15 I thus treat Mayo's Supplemental Ground 1 as technically exhausted, but subject to the
16 procedural-default doctrine. In their answer, respondents may assert procedural default as a
17 defense to any of Mayo's claims, including Supplemental Ground, and they must address the
18 merits of each of Mayo's claims. In his reply to respondents' answer, Mayo may assert, as cause
19 for his procedural default of any claim including Supplemental Ground 1, that he did not have
20 counsel in his state habeas action. *See Martinez*, 566 U.S. at 17. Mayo should also address the
21 merits of each of his claims.

22 As a final matter, Mayo remains incarcerated at Nevada's Southern Desert Correctional
23 Center (SDCC). Jo Gentry is now the warden of SDCC. Therefore, under Federal Rule of Civil
24 Procedure 25(d), Jo Gentry will be substituted for Brian Williams as the respondent warden in
25 this action.

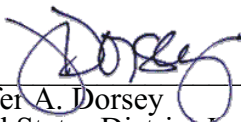
1 **ORDER**

2 IT IS THEREFORE ORDERED that petitioner's Motion for Stay and Abeyance (ECF
3 **No. 30) is DENIED.**

4 IT IS FURTHER ORDERED that **respondents have until November 1, 2017, to file an**
5 **answer** that responds to all of petitioner's claims for habeas corpus relief as described above. In
6 all other respects, the schedule in the order entered April 20, 2016 (ECF No. 5) remains in effect
7 (petitioner will have 60 days following respondents' answer to file a reply).

8 IT IS FURTHER ORDERED that the Clerk of the Court must substitute Jo Gentry for
9 Brian E. Williams, Sr., on the docket for this case, as the respondent warden, and update the
10 caption of the action to reflect this change.

11 DATED: August 3, 2017

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Jennifer A. Dorsey
United States District Judge